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IN THE

Supreme Court of the United States

OCTOBER TERM 1962

No. 1,172

CLARENCE D. TIPTON,

Petitioner,

versus

SOCONY MOBIL OIL COMPANY, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT OF THE CASE

After a two day trial in the District Court and a hearing in the Court of Appeals for the Fifth Circuit, petitioner seeks to have this Court review a ruling of the Trial Judge on a narrow point of evidence which, even if in error, was held by the Court of Appeals not to have prejudiced petitioner's rights.

This action was brought under the provisions of the Jones Act, 46 U.S.C., Section 688, to recover damages resulting from an injury at a oil well drilling site in the Gulf of Mexico. Respondent was engaged in the exploration and production of oil from a fixed platform located in the Gulf of Mexico. The derrick and related drilling machinery necessary to drill the well were located on the fixed platform which was tended by a vessel known as

DRILLING BARGE NO. 1. At the location, respondent employed a vessel crew to man the drilling barge, maintain it, moor it, handle lines of smaller supply vessels, etc. Respondent also employed a drilling crew who did the work incident to the drilling of the oil well to the same extent as a drilling crew would do ashore. Petitioner was a roughneck and a member of the drilling crew. The substantial portion of his duties was performed aboard the fixed platform. At the time of his injury, petitioner was standing aboard a cargo vessel moored to the tender and was assisting in stacking pipe aboard the cargo vessel. He received an injury when he was caught between a lift of pipe and the side of the cargo vessel.

The complaint in the District Court did not allege that petitioner was a member of a crew of any vessel and despite repeated inquiry, it was not until petitioner's opening statement to the jury that he took the position that he was a member of the crew of DRILLING BARGE NO. 1. After a two day trial which went into the question of petitioner's status as a crew member of DRILLING BARGE NO. 1 *vel non*, petitioner's negligence, defendant's negligence, petitioner's medical condition and quantum, the case was submitted to the jury on special interrogatories. The first interrogatory involved the jurisdictional issue of whether or not petitioner was a crew member of DRILLING BARGE NO. 1. After lengthy deliberation, the jury replied that petitioner was not a member of the crew of DRILLING BARGE NO. 1. The remaining interrogatories were not answered.

Petitioner then appealed to the Court of Appeals for the Fifth Circuit. The major portion of petitioner's brief and argument related to alleged error in the Trial Judge's charge on the status issue. As an afterthought, petitioner urged that the District Court erred in permitting proof

by respondent that, following the injury, respondent, in recognition of its obligation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., Section 901 *et seq.*, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C., Section 1331, had made payments of compensation as required by that act and that petitioner, with knowledge of the fact that the payments were made under the act, had received, retained and expended those sums. The Court of Appeals affirmed and held that the charges relating to status were proper, that the District Judge's action in permitting evidence as to payment of compensation benefits was improper, but that because the jury concerned itself only with the question of status, there was no prejudice to petitioner's rights by reason of the error. One judge dissented on the latter point. *Tipton vs. Socony Mobil Oil Company*, 315 F. 2d 660. A petition for rehearing was then filed and, after consideration, denied.

THE QUESTIONS PRESENTED

Respondent submits that the questions presented by the record are as follows:

(1)

In an action under the Jones Act where the status of the plaintiff as a member of the crew of any vessel is contested, is it error to permit evidence that plaintiff accepted and retained benefits under the Longshoremen's and Harbor Workers' Act to be considered by the jury on the jurisdictional issue as to plaintiff's status?

(2)

If the answer to the first question is in the affirmative, then were any substantial rights of petitioner prejudiced by the error?

As above noted, the first question is a narrow evidentiary issue and the second, which has been twice considered and determined adversely to petitioner by the Court of Appeals, involves merely a factual determination.

ARGUMENT

The complaint in the District Court alleged only that petitioner's employment "was such as to entitle him to the protection and benefits of Section 688 of Title 46, U.S.C., commonly known as the Jones Act." In its answer to the complaint, respondent denied this allegation and specifically averred that plaintiff's exclusive remedy was under the provisions of the Longshoremen's and Harbor Workers' Act.

The Outer Continental Shelf Lands Act, *supra*, provides in Section 1333 (c) that with respect to disability or death of an employee resulting from an injury occurring as the result of operations described in subsection (b) of the Section, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Act. The operations referred to in subsection (b) are "exploring for, developing, removing or transporting by pipe line the material resources" of the subsoil and seabed of the Outer Continental Shelf. As is noted above in the statement of the case, petitioner was employed as a member of respondent's drilling crew in connection with the exploration for, and the production of, oil and gas underlying the continental shelf and he was engaged in the endeavor at the time of his injury. Respondent, therefore, at the trial in the District Court, offered objective evidence as to the nature of petitioner's duties and also evidence of the acceptance of benefits under this compensation act to show plaintiff's determination of his own status. It is important to bear in mind that the only

issue considered by the jury related to petitioner's status as a member of the crew of DRILLING BARGE NO. 1. Certainly on this issue proof as to whether or not petitioner considered himself to be a crew member of a vessel or an employee of a drilling company engaged in the exploration for and production of oil and gas was a relevant factor to be considered by the jury. The District Court in its charge to the jury dealt with the distinction in coverage between the Longshoremen's and Harbor Workers' Act on the one hand and the Jones Act on the other. This we submit was necessary to permit the jury to have in its mind the overall picture and the distinction between a member of a drilling crew and a member of a vessel's crew. Petitioner has submitted no authority for the proposition that it is reversible error to permit proof of a prior inconsistent position. This is what was done and it is our submission that the District Court action was proper.

Even conceding that the District Judge was in error as the Court of Appeals found in permitting the introduction of evidence as to payments of compensation, we submit that the Court of Appeals was correct in finding that this error was inconsequential. The Court said:

> "However, in view of the fact that the jury, having decided the question of status adversely to appellant [petitioner], never reached the issue of damages, we believe that the error did not prejudice appellant and was harmless."

As noted in the dissenting opinion in the Court of Appeals, during the jury's deliberations, they sent in a

question to the Court which was answered. If there were any error in permitting proof of the compensation benefits, it was certainly cured by the answer that the Court gave to the jury's question. The question and answer are as follows:

> Question: "If we find Mr. Tipton is not a seaman then **are** a member of the crew of DRILLING BARGE #1 does he have recourse for compensation under the Outer Continental Shelf or other act?
>
> Answer: This is not a matter for the jury's consideration. You should answer only the questions submitted and the evidence thereon."

If petitioner's counsel in the District Court had been able to answer the question himself, he could not have done a better job for the petitioner's position than the District Judge did. In clear and unmistakable terms, the District Judge restricted consideration of the evidence as to payment of compensation benefits to the question of status. The jury was specifically instructed to disregard any recourse or remedy the petitioner might have under any other act and to limit their consideration solely to the question of whether or not he was a member of the crew of DRILLING BARGE NO. 1. This is not a case where a jury's determination of liability or damages might be influenced by evidence that the plaintiff has a remedy against some other party or by evidence that the plaintiff had already collected from someone else monetary recompense for his injury. The Court of Appeals recognized this and held that, since the jury did

not reach the issue of damages (or, for that matter, the issue of liability) petitioner's rights had not been prejudiced.

With reference to the evidence as to benefits under the Longshoremen's and Harbor Workers' Act, the words "constant preoccupation" course through the dissenting opinion in the Court of Appeals and are picked up in the petition in this Court. This is an overstatement of the record. The trial in this case was lengthy and the record comprises 454 pages. The issues of liability, physical condition, quantum, etc. were hotly and at length contested. There are only a few references in the record to the matters of which petitioner complained. In opening argument, reference was made to the fact that petitioner was employed as a member of a drilling crew and that he had a remedy under the Longshoremen's and Harbor Workers' Act. In his testimony, petitioner could not recall certain periods of disability and was then asked to identify two receipts which he had executed for payments tendered under the Longshoremen's and Harbor Workers' Act. He did so and these receipts were offered to show the payment of compensation to refresh petitioner's recollection as to the periods of disability and "to show that the witness received, acknowledged and retained compensation benefits paid to him under the provisions of the Longshoremen's and Harbor Workers' Act." The compensation act was mentioned in the judge's charge when he distinguished the coverage of that act and the Jones Act and reference was made to it in closing argument. In a record of 454 pages, this cannot be characterized as "constant preoccupation."

CONCLUSION

We respectfully submit that there is no ground on the record of this action for granting a writ of certiorari and respectfully urge that the petition be denied.

Respectfully submitted,

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